

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

2000

The Pursuit of the Hunt, Interrupted: Changing Literary Image of Law

William J. Wagner

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Jurisprudence Commons](#)

Recommended Citation

William J. Wagner, The Pursuit of the Hunt, Interrupted: Changing Literary Image of Law, 49 CATH. U. L. REV. 945 (2000).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE PURSUIT OF THE HUNT, INTERRUPTED: CHANGING LITERARY IMAGES OF LAW

William Joseph Wagner⁺

The Law and Literature Movement appeared within American legal scholarship some fifteen years ago.¹ Yet, the inherent methodological challenge of the project continues to elicit uncertainty. The legal method of case adjudication and legislative drafting makes language an instrument to control conduct and outcomes in social life. The argumentation of the legal brief uses language as a tool to reach pragmatic results.

The imaginative use of language in literature differs. The notion of lawyers turning to literature as a source for legal studies leads some to fear for the rigor of legal reasoning and others for the integrity of literary interpretation.² Each study in law and literature is an occasion for further methodological and theoretical clarification of the law and literature project. This is true even as each study seeks to reveal new insights about law from the study of particular literary works.³

⁺ Professor of Law, The Catholic University of America, Columbus School of Law; A.B., University of California, Los Angeles, 1975; J.D., Yale University Law School, 1978; M.A., The Catholic University of America, 1983. My thanks to Denise Ryan for her research assistance in the preparation of this article.

1. See generally RICHARD H. WEISBERG, *THE FAILURE OF THE WORD* (Yale Univ. Press 1984); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (Univ. of Wisc. Press 1985); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (Univ. of Chicago Press 1984). James Boyd White has sometimes been called the father of the movement. His own work in the area traces back to *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). A comprehensive and influential work is RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (Harvard Univ. Press 1988) [hereinafter POSNER, *LAW AND LITERATURE*].

2. Judge Richard Posner wrote:

But is it a healthy, balanced, and fruitful growth [of the law and literature movement]? I have some doubts. Although some fine scholarship has appeared, the extent to which law and literature have been mutually illuminated is modest. Some practitioners have exaggerated the commonalities between the two fields, paying insufficient heed to the profound differences between law and literature. In their hands literary theory, or particular works of literature, are contorted to make literature seem relevant to law, and law is contorted to make it seem continuous with literature.

POSNER, *LAW AND LITERATURE*, *supra* note 1, at 13.

3. Author Martha Grace Duncan illustrates the sometimes disturbing character of

The present article is no exception. Its topic, "The Pursuit of the Hunt, Interrupted," is a striking image recurring in Western literary representations of law. The image expresses the transformative power of law. The classical instance appears in the work of Aeschylus, and later examples pattern in works by Charles Dickens, Franz Kafka and Tom Wolfe. In these works, the image reveals evolving and radically contrasting conceptions of law. The original use of the image to represent law as liberating objectivity gives way to its employment to depict law as violated privacy and even the existential disintegration of the self. Each of these diverse conceptions provides fertile ground for jurisprudential reflection. In the course of reaching its substantive conclusions, this article seeks to shed light on the theoretical and methodological requisites of a valid and fruitful application of literary sources in jurisprudence.

The article begins by explicating the original literary image of the pursuit of the hunt interrupted, within its thematic setting in Aeschylus. It then offers theoretical and methodological postulates for drawing out the fuller meaning for law and legal studies of the image. It explores variations on the same pattern of imagery in subsequent works of Western literature, and offers reflections on how these variations can enrich our understanding of the nature and meaning of law.

I. THE IMAGE OF THE "PURSUIT OF THE HUNT, INTERRUPTED" IN AESCHYLUS'S *THE EUMENIDES*

Among literary representations of law, few equal Aeschylus's *The Eumenides*,⁴ the concluding play in the tragic cycle of plays known as the *Oresteia*. As part of the heritage of classical Greece, this play stands close to the fountainhead of the Western political tradition.⁵ Perhaps no other work, whether ancient or modern, makes the nature and meaning of law and legal process such a central theme. In *The Eumenides*, Aeschylus's literary depiction of law relies on the image of the "pursuit of the hunt," which is interrupted and transformed dramatically by the

the insights of studies in law and literature in her writings. See generally MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BLESSED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT (1996). The following is a sampling of section headings from her book: "Cradled in the Sea: Positive Images of Prison and Theories of Punishment;" "A Strange Liking: Our Admiration for Criminals;" "In Slime and Darkness: The Metaphor of Filth in Criminal Justice;" and "The Romanization of Criminals and the Defense Against Despair." *Id.*

4. AESCHYLUS, *The Eumenides*, in THE ORESTEIA 227 (Robert Fagles trans., Penguin Books 1977) [hereinafter AESCHYLUS, *The Eumenides*].

5. See generally JOHN JONES, ON ARISTOTLE AND GREEK TRAGEDY (1962); See also generally WALTER KAUFMANN, TRAGEDY AND PHILOSOPHY (Anchor Books 1968).

intervention of legal process. As a first step in its inquiry, this article sets out this literary image and its meaning within the thematics of *The Eumenides*.

As the action in the play commences, the hero Orestes, although a human being, is prey in a hunt. His pursuers are the Furies, hideous mythological creatures who avenge the unnatural murdering of parents. Having shed the blood of his mother, Orestes appears doomed to the House of Atreus, that "echoing womb of guilt"⁶ from which he springs. His destruction by the Furies is the inexorable next step in the Atrean cycle of vengeance, guilt, and violence, because "[f]ate ordains . . . the Furies, absolute till the end of time."⁷

Orestes's death appears the necessary consequence of having murdered his mother, Clytaemnestra. Just as her death appears to be the result of her having betrayed her husband, Agamemnon. Likewise, Agamemnon's fate appears to be the necessary consequence of his ritual sacrifice of Orestes's sister, Iphigenia, which conjured winds to launch the Greek fleet. Thus, when her son Orestes asks, "[w]hat—kill my father, then you'd live with me?" Clytaemnestra answers, "[d]estiny had a hand in that, my child," and he responds, "[t]his too: destiny is handing you your death."⁸

The dramaturgical challenge in *The Eumenides* is to resolve the complex action of the cycle's preliminary and middle plays.⁹ Aeschylus formulates the needed resolution by first heightening the tension as Apollo, the god of reason, is unable to drive the Furies away.¹⁰ In response to Apollo's efforts to control them, the Furies retort, "Lord Apollo, now it is your turn to listen."¹¹ Aeschylus then resolves this tension through the device of acquittal by a human law court, the Tribunal of the Areopagus. Pallas Athena divinely established the Tribunal when cautioning: "But by all rights not even I [Athena] should decide a case of murder—murder whets the passions But since the matter comes to rest on us, I will

6. AESCHYLUS, *Agamemnon*, in *THE ORESTEIA* 99, 145 (Robert Fagles trans., Penguin Books 1977) [hereinafter AESCHYLUS, *Agamemnon*].

7. AESCHYLUS, *The Eumenides*, *supra* note 4, at 248.

8. AESCHYLUS, *The Libation Bearers*, in *THE ORESTEIA* 217 (Robert Fagles trans., Penguin Books 1977) [hereinafter AESCHYLUS, *The Libation Bearers*].

9. See generally AESCHYLUS, *Agamemnon*, *supra* note 6; AESCHYLUS, *The Libation Bearers*, *supra* note 8.

10. See AESCHYLUS, *The Libation Bearers*, *supra* note 8, at 191. Apollo commissioned the killing of Clytaemnestra and her lover when stating: "Gore them like a bull! . . . or pay their debt with your own life." *Id.*

11. AESCHYLUS, *The Eumenides*, *supra* note 4, at 238-39.

appoint the judges of manslaughter, swear them in, and found a tribunal here for all time to come."¹²

Appeased and transformed, the Furies concede the authority of the Tribunal's verdict by the play's end. They shed their dreaded form, their threats of "poison over the soil," and "the bloody tide."¹³ The Furies become the "Eumenides," the benevolent guardians of hearth and home to whom the women of Athens enjoin: "You great good Furies, bless the land with kindly hearts, you Awesome Spirits, come—exult in the blazing torch, exultant in our fires, journey on."¹⁴

Within the frame of the final play, the pre-legal human situation is represented as one of anxiety and flight before pursuers in the form of instinctual, customary blood loyalties, and animosities (i.e., the Furies).¹⁵ Guilt flows from the pollution of blood spilling in violation of a taboo. Questions of justification or excuse, central to law, do not check the Furies, who claim that "we broke no trial—no god can be our judge."¹⁶ The taboo arises from the biological relationship of human generation.¹⁷ Its violation calls for automatic retribution in the form of "bloodlust."¹⁸ The Furies hound to death, presenting themselves as a force of remembrance,¹⁹ of rotting life,²⁰ and of rage and revulsion.²¹

II. SEEKING THE MEANING OF THE LITERARY IMAGE FOR LEGAL STUDIES

Aeschylus's vision is a philosophical one, and his themes are expressly jurisprudential. With a lack of care, *The Eumenides* might be read as jurisprudence rather than literature. In such a reading, the play would be interpreted as legal reasoning, making its points through literary devices. This error would be only compounded if the reader mistook the author's

12. *Id.* at 252-53.

13. *Id.* at 266.

14. *Id.* at 276.

15. *See id.* at 234 (describing the Furies: "Deep in the endless heartland they will drive you, striding horizons, feet pounding the earth for ever, on, on over seas and cities swept by tides!").

16. *Id.* at 246.

17. *See id.* at 243 (explaining that it is "the mother's blood that wets the ground").

18. *Id.* at 269.

19. *See id.* at 246.

20. *See id.* at 233.

21. *See id.* at 233, 238 (describing the Furies: "But black they are, and so repulsive. Their heavy rasping breathing makes me cringe . . . their eyes ooze a discharge, sickening, . . . black froth erupting from [their] lungs, vomit the clots of all the murders [they] have drained.")

borrowings from Greek mythology to validate the authority of law for a paradigm of literature's proper use "at the hands of the law." An example might be his use of Athena, the goddess of wisdom, to cast the deciding vote for acquittal, giving divine sanction to the authority of human law. But this is merely sacred literature at the hands of the profane.

On reflection, *The Eumenides* is precisely the opposite of "literature in the hands of law." It is "law at the hand of literature." The meaning of law in the play is found within an imaginative construct; it has an aesthetic context, not a social or philosophical one.²² The persuasiveness of literary depictions of law derives, not from philosophical argument or factual proof, but from the narrative's aesthetic or imaginative power. If legal studies are to draw on literary meaning, they must give an account of the difference between literary and legal meaning. They must also devise a methodology for translating literary meaning into the mentality of their own discipline. An excursus dealing with the relation between legal and literary meaning will, therefore, be a prelude to interpreting Aeschylus's use of the hunt to represent the law's transformative power.

A. Existing Approaches to Law and Literature: Law and Economics and Critical Legal Studies

Two schools of thought propose possible solutions to the problems of translation posed by the study of law and literature. One of these is the school of "law and economics," as postulated by Richard Posner.²³ The other school is Critical Legal Studies, as pursued by thinkers like Roberto Unger.²⁴ The "law and economics" solution conceives of the law as facilitating a rational economic choice. It holds that law exists to maximize wealth.²⁵ In effect, it treats law as instrumental for realizing a certain conception of human nature.²⁶ In this approach, literature's value for legal studies lies in illustrating these ideas. Literature provides situ-

22. See generally ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* (Willard R. Trask trans., 1953).

23. See generally, e.g., RICHARD A. POSNER, *The Economic Approach to Law*, in *THE PROBLEMS OF JURISPRUDENCE* 353-91 (Harvard Univ. Press 1990); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* pt. 1 (Harvard Univ. Press 1983) [hereinafter POSNER, *THE ECONOMICS OF JUSTICE*].

24. See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) [hereinafter UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT*]; ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* (1976) [hereinafter UNGER, *LAW IN MODERN SOCIETY*].

25. See POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 23, at 65-87.

26. This conception is exposed in the postulates of neoclassical economics.

ational paradigms for tracing the implications of economic theory. In *Economics of Justice*, for example, Judge Posner uses Homer to illustrate his theory of law as wealth maximization.²⁷ In *Law and Literature: A Misunderstood Relation*, he interprets *The Eumenides* as a meditation on the relative inefficiency of the strict liability of a revenge code, compared to more sophisticated fault-based systems.²⁸ He relates literature and law by reducing both to normative economics. Owen Fiss has argued that such an approach represents the “death of law.”²⁹ James Boyd White has argued that however effective in communicating economic insights, it results in readings of literature that are unsatisfactory.³⁰

Critical Legal Studies proposes a radically different theory and method for relating law and literature. It relies on the deconstruction of French literary criticism and treats law as an artifact of politics.³¹ It considers the legal text a record of the faction’s effort to memorialize its vision of reality, once it has prevailed in a political dispute. Upon closer reading, the legal text reveals itself to be the product of an act of will, which bears traces of the alternative visions it has suppressed in coming into existence.³² Critical jurisprudence exists to expose the power struggles concealed behind the law and to enable subjectively authentic visions of good to contend with more established views in the ongoing political struggle.³³ Since the literary text is essentially the artifact of political opposition, its surface meaning deconstructs to reveal alternative perspectives, which were denied a hearing in its creation. These embody the same marginal vantage points excluded by the victorious parties who achieve control of the law. Thus, in *The Eumenides*, the acquittal of the matricide, Orestes, may be interpreted as the suppression by patriarchy of matriarchy, symbolizing the literary and mythic co-optation of the feminine. The attribution of the authority of the goddess Athena to her birth from the head of a male god, rather than from a mother can be so

27. POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 23, at 119-45.

28. POSNER, *LAW AND LITERATURE*, *supra* note 1, at 34-38.

29. Owen M. Fiss, *The Death of Law*, 72 *Cornell L. Rev.* 1, 2-8 (1986).

30. See James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 *HARV. L. REV.* 2014, 2014 (1989) (reviewing POSNER, *LAW AND LITERATURE*, *supra* note 1).

31. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 743 (1987); Daniel Williams, *Law, Deconstruction and Literature: The Critical Stances of Derrida and Foucault*, 6 *CARDOZO ARTS & ENT. L.J.* 359, 359-72 (1988); see generally JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* (Alan Bass trans., 1982); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., 1978).

32. See Balkin, *supra* note 31, at 762-63.

33. See UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT*, *supra* note 24, at 109-17.

interpreted.³⁴ But, it can be countered that the dichotomies and oppositions of the play's themes relating to gender arise within the author's intention and do not depend upon deconstruction of the work as an imaginative whole.³⁵

Critical Legal Studies makes its purely negative critique and its commitment to politics a bridge for connecting law and literature. The price, however, is a reduction of both law and literature to politics.³⁶ This reduction undercuts the possibility of reasoned justification of moral positions.

Neither "law and economics" nor Critical Legal Studies can sustain an adequate reading of the image of the pursuit of the hunt, as it appears in *The Eumenides*. Each school makes as an *a priori* partial truth the link between law and literature. Each disregards the unity of the literary work for the sake of ensuring that some feature of the work corresponds to the *a priori* element with which it starts. Having broken the work's unity, both schools distort what they selectively appropriate, discounting what does not fit their *a priori* assumptions and interests.

B. The Theoretical and Methodological Challenge for the Law and Literature Movement

The theoretical and methodological challenge for the Law and Literature Movement is to find an alternative that builds bridges from literature into legal studies, without incurring the reductionism of "law and economics" or Critical Legal Studies. Such an alternative properly starts with the distinctive nature of literature as an imaginative construction of reality.³⁷ Literary meaning takes form through a willing suspension of disbelief, allowing fragmentary verbal symbols and images to stand for the whole of reality. The literary construction of reality works because of the human capacity, and need, to grasp the meaning of the whole of reality, even though the human being's actual encounter with reality remains partial, limited to the narrow categories of human thought and

34. See Robin West, *Law, Literature, and the Celebration of Authority*, 83 NW. U. L. REV. 977, 1003 (1989) (reviewing POSNER, *LAW AND LITERATURE*, *supra* note 1).

35. See Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1052-54 (1988). Gewirtz states that *The Oresteia* can be viewed as "a myth of inclusion" of the female. *Id.* at 1054 (citing *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (1971)).

36. See Fiss, *supra* note 29, at 14-15. Fiss charges this application of deconstructionism to law, no less than he does "law and economics," as implying "the death of law." *Id.*

37. See generally I.A. RICHARDS, ET AL., *THE FOUNDATIONS OF AESTHETICS* (2d ed. 1925).

speech.³⁸ By definition, the literary work always is an end in itself. Readings of a work will occur within a tradition of interpretation³⁹ and will be colored by the reader's attitudes and interests.⁴⁰ However, the literary work, if it has merit, properly remains an object of interpretation for its own sake.⁴¹

Likewise, the project of relating literary sources to legal studies must begin with insight into the distinctive nature of the law, as another verbal construction of reality. Where literature makes possible a kind of imaginative knowing, law mediates a kind of practical choosing and acting.⁴² Through its verbal forms, the law instantiates relationships of persons to one another and to things. Legal forms are taken as the relationships they symbolize, so that they can be manipulated. This act of identification requires a practical, as opposed to imaginative, suspension of disbelief.

The law, for instance, stipulates that the words of a contract tell the relationship between two persons, or that those of a deed signify the relationship between the person and a tract of land. It can do so, only through the human capacity and need to treat such relationships as things.⁴³ Similarly, the law can provide for the adjudication of an accused's criminal guilt only through the human capacity and need to treat the criminal's dereliction as a thing.⁴⁴ The legal construction of reality

38. See MURRAY KRIEGER, *EKPHRASIS: THE ILLUSION OF THE NATURAL SIGN* 261 (1992) ("Let me . . . introduce the doubts . . . created by the fear of parochialism, as I worry about putting forth . . . this unique cultural mission for literature: the mission of catering both to our need for *semiotic illusion*"); see also T. W. ADORNO, *AESTHETIC THEORY* 191 (C. Lenhardt trans., 1970) ("[E]very act of making in art is an endless endeavour to articulate what is not makable, namely spirit.").

39. See F. R. LEAVIS, *REVALUATION* 3 (1947) ("In dealing with individual poets the critic, whether explicitly or not, is dealing with tradition, for they live in it."); see also T. S. ELIOT, *Tradition and the Individual Talent*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 47-49 (1972).

40. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (Harvard Univ. Press 1980).

41. See James Boyd White, *Law and Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 428 (1982) (referring to this notion as a work of literature's "irreducibility"); see generally W. K. WIMSATT, JR., *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* (1967).

42. Law can be understood as an expression of practical reason. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHT* 260-96 (1980). As such, it represents an "embodiment of public morality." Fiss, *supra* note 29, at 14. The rejection of this concept is seen as the "common base line" of both law and economics and Critical Legal Studies. *Id.*

43. See generally AXEL HÄGERSTRÖM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* (C.D. Broad trans., 1953).

44. See generally *id.*

treats its fragmentary symbols, rituals, and gestures as the whole of relationships, which actually are nontangible and transcend any particular concrete manifestation. Legal method seeks univocal and instrumental uses of language.⁴⁵ In this respect, it differs decidedly from literary uses of language, which makes use of ambiguity, irony, and multiple meanings.⁴⁶ Thus, legal method is prone to violate the literary texts on which it bestows its attention.

C. Consciousness of the Diverse Ways Literature Has Value for Law

If lawyers are to make sense of literary sources, they must read them as an imaginative construct, while relating them to law, which is a practical or moral construct. If this interconstructive reading is to work, lawyers must orient their reading to values with meaning both within the literature they are reading and within their own constructive efforts within law. The law has an instrumental character at one level, but for its fuller meaning it also depends decisively, on basic values at other levels. Awareness of these diverse values and how they come to expression in literary sources makes possible the effective use of such sources by legal studies.

1. Enhanced Appreciation of Language

One value supporting an authentic reading of literary sources by lawyers is the undifferentiated human capacity to employ language. This capacity makes both law and literature possible. The linguistic nature of law is, for example, the basis of the jurisprudence of H.L.A. Hart and his

45. In the words of Oliver Wendell Holmes, Jr.:

Far the most important and pretty nearly the whole meaning of every . . . effort of legal thought is to make [the statement of the rule] more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 61-62 (1897).

46. Literary language expresses ambivalence and ambiguity in part because of its emotive character. "The emotions correlative to the objects of poetry become a part of the matter dealt with . . . presented in their objects and interpreted as a pattern of knowledge." WIMSATT, *supra* note 41, at 38.

followers who treat law as a language game.⁴⁷

By appreciating fiction with legal themes as literature, lawyers are able to deepen their appreciation for the intrinsic value and beauty of language in all of its manifestations.⁴⁸ On the level of rhetoric, the lawyer can seek to emulate literature in its stylistic beauty and subtlety. If lawyers perceive the virtuosity of Aeschylus, they may come to write better legal opinions,⁴⁹ and effectively incorporate dramatic and literary allusions to attain greater truth and elegance in legal expression.

2. Critical Consciousness of the Contingency of Form and Meaning in Law

By representing law imaginatively, literature allows lawyers to gain distance and perspective on their own form of representing reality. The resulting vision can enable lawyers to undergo a critical conversion, according to which they understand the contingency of their own construction of reality. By grasping that Aeschylus's representation of the Tribunal of the Areopagus is but a literary device serving Aeschylus's contingent purposes,⁵⁰ the lawyer can comprehend the contingent nature of the language and concepts applied, for various purposes, in every courtroom.⁵¹

As the legal reader understands that a preconscious orientation to value underlies the response of the characters within the literary narrative, he or she is likely to become more aware of his or her own precon-

47. See H. L. A. HART, *THE CONCEPT OF LAW* 83-84, 86 (1961).

48. "In some broader way, all the efforts of our verbal wisdom—philosophy, history, science, religion, law—are myths, all myths, that is, imaginative constructs." W.K. WIMSATT, JR., *DAY OF THE LEOPARDS: ESSAYS IN DEFENSE OF POEMS* 75 (1976) [hereinafter WIMSATT, *ESSAYS*]. "[T]he real value literature has in legal studies is . . . nothing more than the delight its greater vision elicits in the reader, and the hope . . . the reader's vision will become more discerning for the effort of reading." William Ian Miller, *Beating Up on Women and Old Men and Other Enormities: A Social Historical Inquiry into Literary Sources*, 39 *MERCER L. REV.* 753, 766 (1988).

49. See Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor*, 57 *N.Y.U. L. REV.* 1, 1 (1982) (exemplifying of this emphasis on law "as literature"); see generally Sanford Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373 (1983).

50. Cf. PAUL TILlich, *SYSTEMATIC THEOLOGY* (Univ. of Chicago Press 1967). Paul Tillich uses the idea of a broken symbol to express the loss of naive belief in symbols, but argues that it is only when symbols are "broken" in this sense, through critical awareness that understands their contingency, that they can be fully appropriated by theological understanding. See generally *id.*

51. W.K. Wimsatt, Jr. asserts that "[l]iterary study helps us to see through false myths, half-truths, mob speech, and gabble idioms" by raising our critical awareness. WIMSATT, *ESSAYS*, *supra* note 48, at 75.

scious assumptions, shaping his or her expectations about law and other aspects of social life. Such critical-mindedness supports a more truly equitable application of the rules to the facts of a case, and a fairer consideration of various possibilities of legal reform.

3. *Deepening of the Capacity for Empathy through Imaginative Identification with Others*

Literature invites the reader to identify, in feeling, with diverse perspectives and modes of construing reality as an expression of transcendence. It calls forth from the reader a universal imaginative identification with diverse subjectivities, even reprehensible ones. Arguably, the greater the literature, the greater its author's "negative capability."⁵² Aeschylus, for example, forges identification with a man who has killed a parent and, at the same time, with the horror of his guilt that the Furies personify.

Some might also say that the greater the literature the more fully it encompasses the diverse ways society construes reality and channels social exchange through its institutions, one of which is law. The adjudicative virtue of *aequitas*, or equity,⁵³ may be deepened in the judge who learns from the diverse subjectivities and circumstances that the "negative ca-

52. THE NEW PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 824-25 (Alex Preminger & T. V. F. Brogan eds., Princeton Univ. Press 1993) (describing a reader's capacity to make present and believable the diversity of human perspectives):

Negative capability is Keats's phrase for a power of sympathy and a freedom from self-consciousness which peculiarly characterize the artist. It occurs in a letter of 22 December 1818: there is a quality that goes "to form a Man of Achievement esp. in lit. & which Shakespeare possessed so enormously—I mean [negative capability] that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason." The quality has to do as well with a capability "of remaining content with half knowledge." Elsewhere, speaking of the "poetical Character" in general, Keats observes that "it has no character—it enjoys light and shade; it lives in gusto, be it foul or fair, high or low, rich or poor, mean or elevated—It has as much delight in conceiving an Iago as an Imogen. What shocks the virtuous philosopher delights the camelion Poet."

Id.

53. Saint Thomas Aquinas defines equity in this way:

Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.

2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1021 (Fathers of the English Dominican Province trans., Christian Classics 1948).

pability” of the literary work expresses. Through their reading of literature, judges may hope to decide cases more fairly, and to articulate a more authentic and subtle jurisprudence of the rules and standards they apply.

4. *Aesthetic Validation of Basic Values*

Each of the three values discussed thus far finds its realization in the character and skills of the reader who is lawyer or judge. But a literary work may also have a value for jurisprudence in illuminating the meaning of legal institutions. A literary work may explore the intrinsic moral value of law itself, as does *The Eumenides*. Or, it may offer a pattern of good in society and individual lives, which suggests that it belongs to the law to advance. Negatively, it may seek to bring into focus the manifold ways in which natural and societal forces may thwart the law’s due end. Persuasiveness of an aesthetic nature may gain the reader’s assent, where overt philosophical arguments might not.

In the absence of contemporary consensus over normative reasoning, the Law and Literature movement has an appeal because it assists jurisprudence in affirming values.⁵⁴ Normative jurisprudence seeks warrants, which can gain general acceptance in the face of a breakdown in what counts as a good moral argument. Both Critical Legal Studies and “law and economics” can be understood as making such uses of literary sources. The ideals espoused by jurisprudential schools merit substantive philosophical evaluation. Literature, as an imaginative construction, deserves separate attention for what its own terms can supply by way of normative direction for law.⁵⁵

Normative jurisprudence ordinarily presents its warrants in the form of propositions. Literary resources can give jurisprudence non-propositional grounds for its positions. Ideas emerge with consciousness that may first take a symbolic form.⁵⁶ Further, literary meaning may

54. See Gary Minda, *Jurisprudence at Century’s End*, 43 J. LEGAL EDUC. 27, 48 (1993) (“[T]he law and literature perspective has been applied by scholars seeking to resuscitate prevailing jurisprudential conceptions of law.”) Minda identifies Dworkin, Fiss, and James Boyd White as using literature as such a crutch. See *id.* at 48-49.

55. Finally, there is the jurisprudential challenge of deciding which normative values found to be aesthetically compelling within the construct of the literary representation can be justified as compelling within the construction of the law. Within legal studies, the instrumental and pragmatic nature of legislative and adjudicative method must itself be grounded in a deeper awareness of the values that justify and place this method within its appropriate sphere as an authentically human activity. At this point, literary study can precipitate a dialogue between legal studies and philosophy.

56. See PAUL RICOEUR, *THE SYMBOLISM OF EVIL* 19 (Emerson Buchanan trans.,

communicate perceptions and relationships concerning value not fully expressible in propositional terms. The literary statement of values takes form as a whole, including specific values within a many-sided frame of meaning. In the imaginative "whole," opposites do not cancel one another. The moral evaluation, which the literary work invites of each character, moral choice, or societal institution, is rarely univocal in its entirety. Jurisprudence incorporates literary borrowings most effectively to express complex truths about human situations, rather than as illustrations of a particular school's basic tenets.⁵⁷

The study of literary techniques has a distinctive value for jurisprudence where the legal system itself enshrines a narrative or story in support of its legitimacy. Examples include the Exodus account from the Bible and the Social Contract myth of seventeenth and eighteenth century political theory.⁵⁸

This application of literary studies extends to other, perhaps less elevated, instances of the law's reliance on narrative. Every judicial opinion can be understood, for example, not merely as a report on how elements of fact properly fit a rule, but as the narrative of a tale in which the holding represents the resolution of the plot. Every legislative act, for that matter, takes notice of a story of a breakdown of social order in which it is to be the resolution of the plot. The legislative act can be understood as a script for stories that will unfold in the future.

Literary sources have special relevance, as well, in forms of linguistically oriented jurisprudence defining themselves as interpretation. For example, Ronald Dworkin considers judicial opinions to be interpretations of texts, themselves prior interpretations of yet earlier texts by other jurists,⁵⁹ so that each judicial opinion adds a further installment in the unfolding story of American law. The measure of the decision's validity, for Dworkin, is essentially the aesthetic determination of whether it advances the overall coherence of the larger narrative framed by the legal system as a whole. In this jurisprudential vision, the methodology of legal reasoning flows directly into that of literary criticism, the principal distinction being whether the text interpreted is legal or nonlegal.

1967) (stating that "symbols give rise to thought").

57. See generally Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

58. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 23 (1983).

59. See generally RONALD DWORKIN, *LAW'S EMPIRE* (Harvard Univ. Press 1986).

D. Interpreting Aeschylus's Image

The meaning of Aeschylus's image of the "pursuit of the hunt, interrupted" for jurisprudence, no less than for literature, must first be studied within the unbroken imaginative whole of the play. Only then can jurisprudence establish reliable connections between that meaning and the object of its own inquiry.

1. *Aeschylus's Image Considered Within the Imaginative Whole of The Eumenides*

Aeschylus's depiction of a human person hunted as the prey has a visceral effect on the reader and elicits primal fear. Such is the import when Chief Fury speaks:

The clear trail of the man. After it, silent but it tracks his guilt to light. He's wounded—go for the fawn, my hounds, the splash of blood, hunt him, rake him down. Oh, the labour, the man-killing labour. My lungs are bursting . . . over the wide rolling earth we've ranged in flock . . . in wingless flight and now we come, all hot pursuit . . . and now he's here, somewhere, cowering like a hare . . . the reek of human blood—it's laughter to my heart!⁶⁰

It is difficult to imagine an experience more terrifying. The person, in such a quandary, would feel fear so intense that he or she could lose the use of reason. At best, he or she would be reduced to a desperate scramble for survival, relying on animal instinct.

The hunted human is not respected as a rational being. He or she is deprived of the fundamentals of security, needed for rational choice and action. Aeschylus analogizes the situation's tendency to overwhelm reason to a sailor going under in a storm at sea: "[H]e'll strike his sails, harried at long last, stunned when the squalls of torment break his spars to bits. He cries to the deaf, he wrestles walls of sea sheer whirlpools down, down, with the gods' laughter breaking over the man's hot heart—they see him flailing, crushed."⁶¹ This image of shipwreck symbolizes the human being inundated by emotion and reverting to futile instincts. He or she is dehumanized even before being captured and killed.

Orestes's actions have triggered the forces that pursue him. He undertook these actions out of conscience (the voice of Apollo) for the sake of justice. Orestes has acted in retribution for an injustice. He avenges an

60. AESCHYLUS, *The Eumenides*, *supra* note 4, at 242.

61. *Id.* at 255.

individual, rather than a bloodline. His action rests on a judgment about what is just within the social relationships of marriage and household.⁶² He seeks to restore honor to damaged social relationships.⁶³ In their simplemindedness, the Furies are unable to acknowledge the justification or excuse Orestes's intentions provide.

The Furies symbolize both the external threat of blood vengeance by human pursuers and the internal effect of guilt or fear of the consequences of past actions. They express both inner and outer pressures undermining Orestes's rational agency. The play's final outcome offers law, as a societal response, transformative of this initial dilemma. Apollo is vindicated. The individual must do justice according to reason, even if this conflicts with the expectations of family and tribe.

As the play's action is resolved, Athena has ruled that the political community is to adjudicate conflicts over past actions, publicly and according to reason. It is to do so through law and legal process. Thus, she establishes a tribunal and it engages in the findings of fact and considers the legal arguments.⁶⁴ The Tribunal reaches an acquittal for the reasons adduced. Clytaemnestra has used treachery to kill Agamemnon in the security of his home, and she has done so to further adultery begun during his absence for the honorable purpose of war. Orestes has acted under divine sanction.⁶⁵ He has been purged and poses no further harm.

Through the image of the "pursuit of the hunt, interrupted," Aeschylus gives imaginative validation to several effects of law: it (1) supports and sustains free and reasonable actions, (2) creates a public realm of political and moral choice, and (3) conditions the validation of kinship and domestic ties upon their integration into a larger composite, including the realm of political and moral freedom.⁶⁶ He represents law as serving

62. *See id.* at 240 ("Marriage of man and wife is . . . stronger than oaths, and Justice guards its life.").

63. *See id.* at 191 ("I can still hear the god—a high voice ringing with winters of disaster, piercing the heart within me, warm and strong, unless I hunt my father's murderers, cut them down in their own style—they destroyed my birthrite.").

64. *See id.* at 253 ("My contestants, summon your trusted witnesses and proofs, your defenders under oath to help your cause.").

65. *See id.* at 256-60. Apollo urged Orestes's action in advance and attested, after the fact, that it was in accord with Zeus's will. *See id.* at 257-61. As a counter-argument to the Furies' assertion of matrilineal loyalty, Apollo asserts before the court that the father, not the mother, is the source of the child. *See id.* at 260. "The woman you call the mother of the child is not the parent, just a nurse to the seed, the new-sown seed that grows and swells inside her. The *man* is the source of life—the one who mounts." *Id.*

66. *See id.* at 269.

to balance biological necessity and moral and political freedom.⁶⁷ The authority of law allows it to fulfill this role, liberating both the individual and the community from the weight of the past, with its cycles of fear, guilt, and vengeance, and creating a "present" for free-choice and action.

For Aeschylus, the imagery of the "pursuit of the hunt" expresses the belief that the law is a haven and refuge. It offers security for ordered choice and action. Aeschylus, however, does not use the image of the hunt only to symbolize the passing away of an older epoch with the emergence of law. He uses it to represent, as well, the fragile balance necessary to the preservation of an ordered social universe in every present moment. The balance of forces upholding the stability of the resolution is fragile. Orestes is, after all, acquitted by only one vote.⁶⁸ If society does not renew its commitment to law, the social order will break and give way again to the cycle of violence, guilt, and vengeance. In Aeschylus's vision, the source of renewal is ever the same: human reason.

2. *Bridging the Divide Between the Meaning of Aeschylus's Image as Literature and Jurisprudence*

Jurisprudence derives meaning from Aeschylus's image by relating it to the values sketched in the preceding section. Merely understanding Aeschylus's narrative as literature, for example, can deepen intellectual and moral virtues in the reader, which are relevant to law, particularly those of equity and critical-mindedness. The image communicates, as well, aspects of complex human relationships pertinent to problems in social order, with relevance in jurisprudence, such as the conflicts between individual and group, parent and child, and male and female.

Aeschylus's image serves as a part of a founding myth legitimating the Athenian legal system.⁶⁹ Thus, it can be enlightening to compare it with the Social Contract—arguably the legitimating myth of American law. The Greek story justifies Athenian law by attributing it to the require-

67. See *id.* at 277 ("All-seeing Zeus and Fate embrace, down they come to urge our union on—Cry, cry, in triumph, carry on the dancing and on!"). Yale Law School Professor Paul Gewirtz's interpretation is slightly different: "law is not and cannot be an enterprise of reason alone." Gewirtz, *supra* note 35, at 1049. This interpretation stresses that Aeschylus asserts that the rule of law integrates society inclusively, including the biology and emotion that the Furies represent, but that reason can integrate precisely because it stands above these forces and directs them. See *id.* at 1048-49.

68. See AESCHYLUS, *The Eumenides*, *supra* note 4, at 260.

69. See David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus, and Plato*, 54 TENN. L. REV. 279, 296 (1987) ("It is overwhelmingly likely, however, that Aeschylus means the case to stand for the beginning of the system of justice.").

ments of reason, which, in turn, mirror the Divine. It suggests societal peace under law as a beneficial consequence providing a ground for accepting the legal system. The order of peace under law replaces the cycle of blood vengeance. The American story, by comparison, justifies the American constitutional system by reference to a compact among self-interested equals. A prudential basis for affirming the system is that it lifts individuals out of the "state of nature," which in some readings is actually a state of war, and in others, is merely a state of isolation and economic inefficiency.

The feature of the legal system at issue in *The Eumenides* is the judicial system. Thus, it may be productive to compare the play with the Montesquiean myth of the American separation of powers as the moving parts of a machine underlying the American concept of the judiciary. Or, one may wish to compare it with John Marshall's vision in *Marbury v. Madison* of cool judicial reason safeguarding the rule of law in the face of legislative or executive incursions.⁷⁰

Concepts from philosophy, depth psychology, or political theory might assist in further drawing out the meaning of Aeschylus's image for inquiry into the nature of law, or for the relationship of law and basic values. However, before turning to other disciplines for such terms, it makes sense to extend the distinctive moment of literary reflection by exploring the meaning of Aeschylus's image within the larger canon of Western literature. The evolving meaning within the Western tradition of the image of the "pursuit of the hunt, interrupted" by law, can enrich jurisprudential reflection on the meaning of Aeschylus's image.

Ronald Dworkin's narrative jurisprudence asserts that judicial reasoning takes at least part of its meaning within a longer tapestry of holdings, extending from the past through the present and on into the future. If that idea is true with respect to law, it must, if anything, be more so of literary works within the collection of works of recognized significance.⁷¹ The Western literary tradition unfolds in historical parallel to Western political, legal, and constitutional traditions. The cumulative meanings of the image within the one tradition can fairly be applied to questions

70. 5 U.S. (1 Cranch) 137 (1803).

71. There is a canon of Western literature defined as "the relation of an individual reader and writer to what has been preserved out of what has been written." HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* 17 (Anne Freegood & Pat Strachan eds., 1994). Harvard University Professor Harold Bloom espouses that it is within that body of preserved work that the meaning and value of any one work is judged. See *id.* Bloom views his beloved Shakespeare as the central author and highest expression of the Western canon. See *id.*

arising from the other. By exploring the meaning of Aeschylus's image within other works of Western literature, the present inquiry can be brought to its conclusion.

III. THE IMAGE OF THE "PURSUIT OF THE HUNT, INTERRUPTED" BY INTERVENTION OF LAW IN LATER WESTERN LITERATURE

Aeschylus's image of the "pursuit of the hunt, interrupted" and transformed by law recurs, with certain qualifications or reversals, in other literary works in Western cultural tradition. Three works of particular interest in this regard are authored by Tom Wolfe, Charles Dickens, and Franz Kafka.

A. *An Instance from Contemporary Fiction: The Bonfire of the Vanities*

The novel *The Bonfire of the Vanities*⁷² depicts the Manhattan bond trading market during the 1980s. The central element of the novel's plot is the law's intervention in "the pursuit of the hunt." Upon first impression, the setting seems remote from Aeschylus's Athens.⁷³ But Wolfe's protagonist, Sherman McCoy, finds himself in flight from forces with an uncanny resemblance to the Furies. McCoy's life becomes a waking nightmare as he discovers that he is the object of an anonymous man-hunt. Investigators are seeking him based on a witness's partial recollection of his license number after a hit-and-run killing. McCoy is an accomplice to the crime, which occurred during a covert meeting with his secret mistress. Having gained notoriety in the press, the case raises an outcry against the as yet undiscovered perpetrators, whose published profile stirs up a mob on grounds of both class and race. As the circle tightens on the parking garage where McCoy has parked his dented Mercedes, his psychic security is progressively undermined. He eventually becomes paralyzed by fear and unable to act.⁷⁴

72. TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987).

73. See generally *id.*

74. See *id.* at 273. ("Sherman opened up the envelope and withdrew the newspaper. Every crackle of the paper accused him.") Sherman continued reading:

The front page . . . of no earthly interest . . . He opened it up . . . Page 2 . . . Page 3 . . . It was at the bottom of the page: SECRET PRINTOUT IN BRONX HIT'N'RUN Declaring "I'm fed up with the foot-dragging," a source within the Division of Motor Vehicles yesterday provided *The City Light* with a computer print out narrowing down to 124 the number of vehicles that might have been involved in last week's hit-and-run maiming of Bronx honor student Henry Lamb. The source . . . said: "They can check out 124 vehicles in a few days. But first they have to want to commit the manpower. . . . Lamb . . . lies in an apparently irreversible coma. Before losing consciousness, he was able to give . . . the

In Wolfe's drama of pursuit, as in Aeschylus's, the law ultimately intervenes to interrupt the chase of the public outcry against McCoy. Despite facing a virtual riot by a disgruntled mob, Supreme Court Justice Myron Kovistky embodies the ideal of law by dismissing the charges against McCoy based on a correct evidentiary ruling:

Now, in the case of the People *versus* Sherman McCoy, the grand jury has returned an indictment I am ordering that indictment dismissed in the interests of justice, without prejudice "Your honor!" [The prosecutor] was on his feet [Prosecutor,] [w]hat makes you think you can come before the bench waving the banner of community pressure? The law is not a creature of the few or of the many. The court is not swayed by your threats.⁷⁵

Although charges are reinstated and the protagonist's guilt has not been adjudicated by the end of the novel, the legal process has worked a moral renewal in McCoy after a life of complacency and privilege.⁷⁶

Just below the surface of Wolfe's contemporary social satire is an outlook influenced by the classics. In important respects, Wolfe shares Aeschylus's vision of law. In his use of the image of the "pursuit of the hunt, interrupted," Wolfe can be read as propounding a view of law like Aeschylus's.

Even so, Wolfe sounds realities unknown to Aeschylus. Athena's absence from Wolfe's story emblemizes the differences in the authors' use of the image of the hunt. In Wolfe's world, gods do not bestow ideals on mortals. The legal act transpires through the painstaking effort of

first letter—R—and five possibilities for the second letter—E, F, B, R, P—of the license plate of the . . . Mercedes Benz that ran him down Sherman's heart jumped inside his chest. . . . Police and the Office of Bronx District Attorney . . . said their investigations were "continuing." They refused comment on the narrowing down of the number of vehicles That was it. Sherman sat . . . staring at the . . . type. Closing the noose!

Id. at 273-74.

75. *Id.* at 647-48.

76. *See id.* at 658. Wolfe describes the situation:

At his arraignment . . . Mr. McCoy appeared before [the] [j]udge . . . with a slightly swollen left jaw and abrasions on the knuckles of both hands. Questioned about it by [the] [j]udge . . . he said, clenching his fists, "Don't worry, Judge. It's something I'll take care of myself." . . . Mrs. McCoy was in the spectator section of the courtroom yesterday, apparently unrecognized by the noisy group of demonstrators . . . who occupied most of the seats. At one point, Mr. McCoy looked toward his wife, smiled slightly, and raised his left hand in a clenched-fist salute. The meaning of his gesture was unclear. Mrs. McCoy refused to speak to reporters.

Id.

constructive thought, as powerful counterforces of conflict among material interests beset the rational process. Apollonian reason does not offer a revelation of justice, rather venal and self-interested attorneys present their arguments. The case turns not on the single, disinterested vote of Athena, but at times, on perjured testimony and prosecutorial misconduct. Wolfe's "Furies" do not acquiesce to divine intervention, but only to political sentiment. Wolfe's Furies are not blood loyalties; they are the forces of mass opinion and class envy, whipped up by a cynical and sensationalist press. The authority of law serves, not to subordinate vital life forces to the higher faculty of reason, as such, but to mediate the acquiescence of diverse interest groups.

Wolfe's protagonist does not come willingly into the court, as did Orestes. He is dragged into the public eye, trembling. In this literary context, the threatened dehumanization is not vengeance or guilt, but merciless publicity ripping away every shred of personal privacy essential to psychic well being. The gauntlet the protagonist runs is the course endured by Leona Helmsley and Jim Bakker, or, of more recent memory, Bill Clinton and Monica Lewinsky. Publicity that for Orestes was a refuge has become annihilation. The legal process, which is the focus of that publicity, becomes, ironically, the catching point for a whole new "pursuit of the hunt."

The law appears now, at least at times, to be the Furies in pursuit. The protagonist's mistress, the actual perpetrator of the hit-and-run in the case, tells him:

"Sherman, let me tell you something. There's two kinds a jungles. Wall Street is a jungle.[""] . . . "And then there's the other jungle. That's the one we got lost in the other night, in the Bronx [In that jungle] [p]eople who are all the time crossing back and forth, back and forth, back and forth, from this side of the law to the other side I . . . gr[e]w up that way. We were always staggering back and forth across the line, like a buncha drunks, and so I know And let me tell you something else. Right there on the line everybody's an animal—the police, the judges, the criminals, everybody."⁷⁷

In Wolfe's story, the classical vision of law prevails because of an upright judge and a protagonist capable of moral growth. The outcome is contingent on good will and reasonableness, which in Wolfe's world may not be taken for granted, but have to be jealously guarded. Even when these elements prevail, the costs in human terms are high.

77. *Id.* at 264.

If the classical influence on Wolfe explains his resemblance to Aeschylus, his sensitivity to the law's pathos stems from his emulation of the Victorian novel. William Thackeray's *Vanity Fair*⁷⁸ is Wolfe's avowed model for *The Bonfire of the Vanities*.⁷⁹ Unlike the unitary moral vision of Aeschylus, the vantage of the Victorian novel presumes an interior moral, emotional, and psychological life, distinguishable from public life, providing a perspective from which to critique social form.⁸⁰ The individual's "private" experience becomes a basis for criticizing law.

B. Charles Dickens's Bleak House: The Thwarting of the Human Heart

The great Victorian novel depicting the pathos of law is Charles Dickens's *Bleak House*.⁸¹ This novel, in its representation of law, employs the image the "pursuit of the hunt, interrupted." The dramatic denouement of its long and intricate plot occurs with the flight of Lady Dedlock before the clamor of the motley Smallweed clan, who have stumbled upon her secret: a love affair resulting in her bearing a child out of wedlock.⁸²

78. WILLIAM MAKEPEACE THACKERAY, *VANITY FAIR* (Random House 1958) (1848).

79. See Steven Erlanger, *Bonfire in Bronx!!! Wolfe Catches Flak!!!*, N.Y. TIMES, Mar. 11, 1988, at B1. Thackeray's *Vanity Fair* is cited as Wolfe's "original inspiration."

80. See generally RICHARD STANG, *THE THEORY OF THE NOVEL IN ENGLAND 1850-1870* (1959).

81. CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (London, 1853) [hereinafter DICKENS, *BLEAK HOUSE*]. When Dickens fails in attaining pathos, he falls into sentimentality: "[Sentimentality is] . . . the term . . . often applied to unsuccessful idealization or pathos, two effects which have earned a particular notoriety in Dickens's hands." HARVEY PETER SUCKSMITH, *THE NARRATIVE ART OF CHARLES DICKENS* 277 (1970).

82. See DICKENS, *BLEAK HOUSE*, *supra* note 81, at 816.

'Your Ladyship, I come to put you on your guard . . . I strongly suspect (from what Small has dropped . . .) that those letters I was to have brought to your Ladyship were not destroyed when I supposed they were. That if there was anything to be blown upon it is blown upon . . . Mr. Guppy picks up his hat and rises. 'Your Ladyship, you know best whether there's anything in what I say . . . Something or nothing . . . She scarcely acknowledges [his] parting words . . . She has thrown herself upon the floor, and lies with her hair all wildly scattered . . . She rises up, hurries to and fro, flings herself down again, and rocks and moans. The horror that is upon her, is unutterable . . . Thus, a terrible impression steals upon and overshadows her, that from this pursuer, living or dead—obdurate and imperturbable before her in his well-remembered shape . . . there is no escape but in death. Hunted, she flies . . . She veils and dresses quickly, leaves all her jewels and her money, listens, goes downstairs at a moment when the hall is empty, opens and shuts the great door; flutters away, in the shrill frosty wind.

Id. at 814-16

This unmasking causes Lady Dedlock to flee.

The "pursuit of the hunt" sends Lady Dedlock on a desperate flight from her tormentors. In an ironic sense, the intervention of law allows her to evade her pursuers, and it transforms the social situation. The rigid stratification of English social identity, reinforced legally, permits Lady Dedlock to shed her identity by changing clothes with a beggar woman, discarding all personal marks of identification, and disappearing into the streets of London.⁸³ She eventually dies of exposure while clinging to the gate of the disease-ridden cemetery where her natural child's father lies buried.⁸⁴

The terminus of her flight differs starkly from that of Orestes. His flight ends on the Acropolis amidst light and the liberation of law. The fact that the party in immediate pursuit in *Bleak House* is Lady Dedlock's lost child, Esther, bearing a note from Lord Dedlock and inscribed with forgiveness, underscores the pathos of Lady Dedlock's "liberation."⁸⁵ When her child arrives to find her corpse, the absolute privacy of death has reunited the natural family. The father is buried under the name of "Nemo," Latin for "no one."⁸⁶ The mother appears, in death, as an unidentified street person. And the child's face has been, with symbolic significance, defaced by small pox.

Lady Dedlock flees as a final move in a game of cat and mouse with Lord Dedlock's lawyer, Tulkinghorn. The lawyer has used the classical deductive reasoning and investigative skills of his profession to uncover Lady Dedlock's secret. He has employed ruthless litigation-like strategy to gain control over her.⁸⁷

83. See *id.* at 868.

84. See *id.* at 868-69.

At last we stood under a dark and miserable covered way, where one lamp was burning over an iron gate, and where the morning faintly struggled in. The gate was closed. Beyond it, was a burial ground—a dreadful spot in which the night was very slowly stirring; but where I could dimly see heaps of dishonoured graves and stones, hemmed in by filthy houses, with a few dull lights in their windows, and on whose walls a thick humidity broke out like a disease. On the step at the gate, drenched in a fearful wet of such a place, which oozed and splashed down everything, I saw, with a cry of pity and horror, a woman lying . . . I passed on to the gate, and stooped down. I lifted the heavy head, put the long dark hair aside, and turned the face. And it was my mother, cold and dead.

Id. at 867-69.

85. *Id.* at 825-26.

86. *Id.* at 185.

87. An instance is seen in the following interaction:

Mr. Tulkinghorn takes out his papers, asks permission to place them on a . . . table at my Lady's elbow, puts on his spectacles, and begins to read by the light

Tulkinghorn's legalistic tortures drive Lady Dedlock to the point of flight from the Smallweeds, and to death. Hortense, a "tigress-like" woman who Tulkinghorn has misused in the course of manipulating others to gain control over Lady Dedlock, stalks and murders him.⁸⁸ This is the human nature that Tulkinghorn has so ruthlessly manipulated and suppressed rebels. In the person of Hortense, the soul of vengeance reaches out and exacts a price on the lawyer whose legal machinations have taken the life of Lady Dedlock and destroyed the happiness of her family.

Dickens affirms the classical idea of the act of legal justice anchoring the social world, the focal theme of *The Eumenides*. He makes this point, for example, as Hortense is brought to justice. Dickens's predominant interest, however, is with the pathos of the law. In *Bleak House*, legal structures divide people from their own natures and from one another. The law's machinery takes on life, as an end-in-itself, typified in the archaic Court of Chancery whose tortuous and futile procedures shape the larger plot of the novel.

In Dickens's world, the legal construction of reality, more often than not, stymies any genuine human flourishing. At its worse, law becomes a trap that the strong set for the weak. Rather than interrupting the hunt, as in *The Eumenides*, the law triggers it. The law's publicity, which was Orestes's liberation and his return to social life, sends Lady Dedlock into the irretrievable privacy of death.

C. The Trial by Franz Kafka: *The Disintegration of the Self*

In *The Trial*, Franz Kafka portrays the experience of law as absurd.

of a shaded lamp. . . . My Lady . . . asks impulsively: 'Who copied that?' Mr. Tulkinghorn stops short, surprised by My Lady's animation and her unusual tone. 'Is it what you people call law-hand?' she asks, looking full at him carelessly again, and toying with her screen. 'Not quite. Probably'—Mr. Tulkinghorn examines it as he speaks—'the legal character which it has, was acquired after the original hand was formed. Why do you ask?' 'Anything to vary this detestable monotony. O, go on, do!' Mr. Tulkinghorn reads again. The heat is greater, my Lady screens her face. Sir Leicester dozes, starts up suddenly, and cries 'Eh? [W]hat do you say?' 'I say I am afraid,' says Mr. Tulkinghorn, who has risen hastily, 'that Lady Dedlock is ill.'

Id. at 61-62 (footnote omitted). Tulkinghorn is a study in professional misconduct, as he allows his fetish for control to supercede both his client's interests and express wishes: "Dickens must have taken grim satisfaction in having an aristocrat undergo the ultimate ignominy of dying in the slums, thanks to a lawyer's labors." Robert S. Glaser & Stephen H. Roth, *In the Matter of Heep, Jagers, Tulkinghorn & Fogg: An Unjarndyced View of the Dickensian Bar*, 29 DICKENSIAN BAR. 278, 294 (1976).

88. DICKENS, *BLEAK HOUSE*, *supra* note 81, at 798-99.

The work is prophetic of the anxieties of twentieth century mass society. In it, Kafka makes use of the image of the "pursuit of the hunt," interrupted and transformed by the law's intervention.⁸⁹ The protagonist, Joseph K., finds himself the subject of persecution by legal authorities pursuing a seemingly endless process against him, without ever positing a true legal act.⁹⁰ He discovers, for example, that he is under investigation for an offense, but never obtains notice of the charge.⁹¹

Officials harass and intimidate Joseph K. through their symbolizations of the law's authority. But their gestures are ineffective in defining Joseph K's guilt in a juridical sense. In Kafka's universe, the law becomes a device for controlling behavior. It stands in vivid contrast to Aeschylus's concept of law as enhancing freedom and enabling action. It places people in partial check, leaving their petty aggressions and appetites unaffected, while preventing them from initiating major disturbances. The legal system itself becomes a regime of multifarious petty aggressions by functionaries.

In Kafka's world, legal process undermines the psychic privacy and security necessary for human agency, and Joseph K. develops paranoia. In the end, he is taken out by two thugs without marks of authority and killed "[l]ike a dog."⁹² Uniformed policemen stroll by the scene without taking note or becoming involved.⁹³ Kafka describes a world where the very possibility of law as a moral ideal has become impossible. Legal symbols have become hopelessly detached from any moral universe in

89. See generally, FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Schocken Books 1984).

90. See generally *id.*

91. See *id.* at 11-12. Joseph K. ponders:

"I cannot recall the slightest offense that might be charged against me. But that even is of minor importance, the real question is, who accuses me? What authority is conducting these proceedings? Are you officers of the law? None of you has a uniform, unless your suit" . . . "is to be considered a uniform, but it's more like a tourist's outfit. I demand a clear answer to these questions, and I feel sure that after an explanation we shall be able to part from each other on the best of terms." The Inspector flung the matchbox down on the table. "You are laboring under a great delusion," he said. "These gentlemen here and myself have no standing whatever in this affair of yours, indeed we know hardly anything about it. We might wear the most official uniforms and your case would not be a penny the worse. I can't even confirm that you are charged with an offense, or rather I don't know whether you are. You are under arrest, certainly, more than that I do not know."

Id.

92. *Id.* at 229.

93. See *id.* at 226-27.

which they could take on human meaning. They function as mere masks for petty annoyance, and ultimately permit the protagonist's judicial murder. This murder represents the definitive disintegration of the self for whom existential authenticity has become impossible.

In the novel, the painter Titorelli paints official portraits expressing the authority of judges.⁹⁴ As the protagonist watches Titorelli work, the images of the judges appear to intimidate from their canvasses and they take on a look of menacing animals. Joseph K. observes as Titorelli paints a representation of "Justice Personified" for one judge's chambers.⁹⁵ As he watches the goddess of Justice being painted, she transforms herself into the goddess of Hunt in Full Cry. To Joseph K's horrified sight, the Pallas Athena of Aeschylus's vision, now completely incredible, becomes the chief Fury in hot pursuit.

Kafka suggests that the words and symbols of legal construction can themselves become a vehicle for sub-rational drives. This occurs where the person and society alike have lost their capacity to assign moral significance to actions and events and merely vie over control. With his final image of the 'goddess Justice' transformed, Kafka expresses insight into the ambiguity of every image symbolizing a moral or legal ideal. Rather than furthering reasonable action, such symbols may trigger stifling guilt and desperate, dishonest efforts at evasion. In the Kafkaesque depths of subjective anxiety, the classical model of Aeschylus has become unbelievable.

Kafka's characters lack the inner resources that sustain Wolfe's classical vision in *The Bonfire of the Vanities*. The pain and alienation occurring through law reach nightmarish proportions. They overwhelm, not only any notion of law as a moral ideal, but the concept of pathos itself.

94. See *id.* at 143-44

95. See *id.* at 146-47. Kafka describes the situation:

[Joseph K. saw] a large figure . . . he could not identify, and he asked the painter whom it was intended to represent. . . . "It is Justice," said the painter at last. "Now I can recognize it," said K. "There's the bandage over the eyes, and here are the scales. But aren't there wings on the figure's heels, and isn't it flying?" "Yes," said the painter, "my instructions were to paint it like that; actually it is Justice and the goddess of Victory in one." "Not a very good combination, surely," said K., smiling. "Justice must stand quite still, or else the scales will waver and a just verdict will become impossible." . . . "My client wished it," said the painter . . . K. watched the delicate crayon-strokes . . . the figure of Justice was left bright except for an almost imperceptible touch of shadow; that brightness brought the figure sweeping right into the foreground and it no longer suggested the goddess of Justice, or even the goddess of Victory, but looked exactly like a goddess of the Hunt in Full Cry.

Id.

The lack of any objective measure of proportionality, such as that found by the Victorians in the simple pleasures of private family life leave the protagonist, who is drowning in his unbounded anxiety and horror, completely unsympathetic.

For Aeschylus, the law bridges the span between inner self-authenticity and outer participation in and ordered community. Kafka, by contrast, sees the law as a heteronomous and invasive force, inaccessible to the individual subject as a touchstone of authenticity. *The Trial* underscores this paralyzing disconnect in its parable of the doorkeeper of the law:

In the writings which preface the Law that particular delusion is described thus: before the Law stands a doorkeeper. To this doorkeeper there comes a man . . . who begs for admittance to the Law The man . . . asks if he will be allowed . . . to enter 'It is possible,' answers the doorkeeper, 'but not at this moment' [T]he Law, he thinks, should be accessible to every man and at all times, but when he looks more closely at the doorkeeper in his furred robe, with his huge, pointed nose and long, thin, Tartar beard, he decides that he had better wait until he gets permission to enter There he sits waiting for days and years Finally his eyes grow dim and he does not know whether the world is really darkening around him or whether his eyes are only deceiving him Before he dies, all that he has experienced during the whole time of his sojourn condenses in his mind into one question He beckons the doorkeeper, since he can no longer raise his stiffening body 'Everyone strives to attain the Law,' answers the man, 'how does it come about, then, that in all these years no one has come seeking admittance but me?' The doorkeeper perceives that the man is nearing his end and his hearing is failing, so he bellows in his ear: 'No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it.'⁹⁶

IV. THE CUMULATIVE SIGNIFICANCE FOR JURISPRUDENCE OF THE IMAGE OF THE "HUNT, INTERRUPTED" BY LAW

Comparison with related images in other literary works does not diminish the independent value for jurisprudence of Aeschylus's original image of the "pursuit of the hunt, interrupted." Aeschylus's image, on its own terms, marks basic and universal objectives of law: the resolution of

96. *Id.* at 213-15.

disputes and attribution of fault, in a manner supporting individual integrity and freedom of action. Where the law cannot fulfill this role, a loss of moral identity threatens the individual from without and within. Society emerges from mere primitive tribalism, with its blood feuds, by adherence to a common concept of legal authority and common norms of behavior, but also through common respect for the inner authority of the individual. In short, human society, as such, emerges with the advent of the rule of law.

All of the literary depictions of the "pursuit of the hunt" considered by this article symbolize a disruption in the equilibrium of forces needed by both individual and society to realize the idea of the rule of law. In each account, law advances or inhibits the reasonable integration of forces within the individual, and within the community, through its mode of conflict resolution.

Comparison with Wolfe, Dickens, and Kafka suggests that Aeschylus does not acknowledge the ways in which law may fail in this integrative endeavor or the casualties that may occur, when the law does succeed. Aeschylus is unable to recognize failure or casualty because of his belief in fate. Even when the cycle of blood vengeance has been broken, Aeschylus's hero, Orestes, remains cool and unfazed throughout the action of the play because his fixed and unchanging character imbues him with reasonableness. He acts well because it is his fate to have the Sun god's counsel and the goddess of Wisdom's protection. The fated character of the downfall suffered of others diminishes our capacity to empathize with them.

As we turn from the optimism of the classical Greeks and to the Victorians, with their concern for the inner pathos of the individual, we discover that the vital biological forces, supposedly integrated at the close of *The Eumenides*, are actually subject to repression in *Bleak House*. Instead of integrating the matrilineal bond into a reasonable societal order, with due recognition for public and private realms, the law suppresses the claims of the blood tie and puts mother and child asunder.

For Dickens, the rule of law remains at the level of aspiration. Legal institutions are ambiguous in their effect. The pathos of negative effects absorbs Dickens's attention. The general rule may do harm in the individual instance so that equitable discretion remains a necessity. The wheels of justice become encrusted through greed, venality, and inattention. The law is *semper reformanda*. Dickens's reformist impulse places him as a contemporary of Bentham's.

Nineteenth and twentieth century literature is aware that the law's in-

tegrative task is more complex than Aeschylus can acknowledge. Authors like Dickens and Wolfe focus on the corrupting effects of the greed and venality of lawyers who bend the law to their clients' private interests and manipulate their clients for the sake of fees.

Both Dickens and Wolfe, moreover, understand the rule of law differently than Aeschylus. Rather than the integration of the biological and the rational, Dickens sees the law's role as coordinating social and economic relationships, accommodating social classes, professions and occupations, and leaving space for individual fulfillment within the sentimental realm of the family. In Wolfe's twentieth-century conception, the law channels mass society's energies, with its atomized millions, and overcomes mutual wariness among ethnic and social groups against the baseline of amoral economic competition.

Aeschylus holds out law as offering stability and security, a respite from the "pursuit of the hunt" for the individual. But, the other authors considered here are conscious that the law sometimes fails to achieve this end. Even where it succeeds, the law's blessings are not unmixed. *The Bonfire of the Vanities* illustrates that the law may bring the annihilating glare of harsh publicity and the violation of privacy, as well as the clear cleansing light of the Acropolis. Its publicity can be a floodlight overwhelming subjectivity, rather than restoring it. *Bleak House* and *The Bonfire of the Vanities* both attest that class interest, greed, and violence can gain command of legal processes. At times, the law becomes the Furies in pursuit, as Kafka vividly reminds us with the image of Justice as the goddess of the Hunt in *Full Cry*.

Dickens and Wolfe qualify the Aeschylean faith in the idea of law, but Kafka appears to reject it. The societal harmony, derived under law for Aeschylus, does not appear in Kafka, who includes in his vision no realm of moral and political freedom. Kafka's world is one of total bureaucracy or even totalitarianism hostile to human subjectivity. For Kafka, the pursuit of the hunt, thus, moves to a point within the psyche. The law, symbolized as the Furies in pursuit, causes the subject to lose his or her inner sense of authority and stability, and to move into paranoid flight. Only death can halt this "pursuit of the hunt." Kafka may imply that courage in the existentialist sense is a counter to the depersonalizing effect of law.

At the very least, Kafka humanizes the judge or lawyer who is his reader by revealing that, for many if not most, the experience of law is, at times, one of "Kafkaesque" dread. The dread may arise because the wheels of the law continue to turn, although disengaged from human

meaning,⁹⁷ or because, in the subject's effort to integrate legal events, it gives rise to pathos exceeding understanding.

Kafka assumes Aeschylus's vision to be untenable, but perhaps he only means to suggest that this is so in a society, such as Kafka's own that has already lost its faith in the Aeschylean ideal. Kafka's story portrays life in a society repudiating Aeschylus's myth, whether that of the Hapsburg Empire in its twilight or the Soviet Union, which followed it in portions of Europe. How, then, does Aeschylus's myth compare to our own story of the Social Contract? What Kafkaesque turn can we expect in our legal culture if we lose faith in it?

What new Furies, understood in either Aeschylean or Kafkaesque senses, might prowl in the wake of such loss of faith? Would the remedy to their arrival lie in renewal through retrieval of the Aeschylean ideal of law as reason, or the forging of a Kafka-inspired jurisprudence of existentialist authenticity?

Literature's insights into law are cumulative and inclusive. Literature, at least, does not require one to elect from the myths it recounts. All of its images remain available for application, juxtaposition, and contrast within jurisprudence. For each ideal it proposes, literature tenders associated disappointments, deflections, detours, lost ways and pains. Literature presents multi-layered pathos and, at the same time, the beauty of the whole of life. By contrast, the school of "law and economics" focuses only on the potential of choice to maximize wealth. Its only "pathos" is a failure to maximize. The school of Critical Legal Studies contemplates literature's expression of the "jurispathic," but regrettably is led by it to discount law as a distinctive ideal.

In its own way, literature, even in the case of Kafka, can be drawn upon to affirm a normative vision of law. Even in the case of a classical author like Aeschylus, however, such a vision includes an element of ambivalence. The consequences of tragic choices may be devastating when the law fails; when the law succeeds it is comedy, in the sense of holding together the broken pieces of tragedy averted.

Lawyers can take the law's ambivalence to heart and still preserve their belief in what they do by adopting a comic stance. Their attitude might reasonably seek to be like Shakespeare's in the later more mature

97. Another reading is possible. *The Trial* has been understood to demonstrate that "criminal mentality operates in a psychological arena as yet only dimly apprehended by society." Raymond L. Hogler, *Conrad, Kafka and the Criminal Justice System*, 3 J. CONTEMP. L. 75, 81 (1976).

comedy, *Measure for Measure*.⁹⁸ This play ends on a mellow, bittersweet note, as its comic resolution of difficulties cannot actually make everything all right.⁹⁹ Under the circumstances of life, the resolution may be the best for which one can hope; its bittersweetness may be the truest statement of the mystery of the human situation.

98. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*.

99. *See id.* act 5, sc. 1.